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G A Belgaum
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pt- II

1953.

File No.

legal DEPARTMENT
A BRANCH

Examined

cm
7/6

Subject:—

Criminal Appeals in the High court
of Bombay against the order of
acquittal from Belgaum District.

(For previous pps pl see pt- I)

G A Belgaum/53
pt II

317-A

File No.

Std. Scott. Slip 24-B

Judgment recorded by the High Court in Criminal Appeal No.801 of 1953 (By Government) in the case of State Vs. Narsu Vithoba Patil.

The Government Pleader for the Government for the State of Bombay - Appellant.

Mr. N.M. Shanbhag, Advocate (appointed) for the Opponent - Accused.

CORAM : Bavdekar and Vyas, JJ.

29th September 1953.

ORAL JUDGMENT (Per Bavdekar, J.):-

This is an appeal against acquittal of the respondent by the learned Additional Sessions Judge, Belgaum, of an offence under Section 302 of the Indian Penal Code.

It appears from the evidence that the house, in which the accused, the deceased Kallappa and witness Dhondiba were living, were formerly one house. It has been partitioned into three portions, and in the southern portion was living witness Dhondiba. The northern portion was divided into two houses. Leaving aside the sopa or an ota on the west, which was common to the houses of both the accused and the deceased, the northernmost part belonged to the deceased's father, and the southern part of the northern portion belonged to the accused's father Vithoba and the accused. It is not in dispute that on the night of the incident the deceased, his brother Ranaba and his father were sleeping in the portion of the sopa just in front of their own house. The prosecution case was that on the 8th of June 1952, the day upon which the offence in this case took place, the father had gone to answer a call of nature to a place about 100 yards away. The deceased and Ranaba, who were sleeping on each side of their father, were, therefore, the only inmates of the sopa at the time when

the incident took place. This incident seems to have taken place sometime earlier than 6-30 a.m., because the evidence of the police patil is that the report was lodged with him at 6-30 a.m. The prosecution says that when Ramu, the father of the deceased, was away for answering the call of nature, the accused went there with a scythe in his hand and inflicted three injuries upon the deceased. One was below the left ear and the other two under the chin. The latter two were each sufficient in the ordinary course of nature to cause death. It was the evidence of the deceased's brother Ranaba that he woke up as the deceased was being assaulted and found the accused assault--ing the deceased. The deceased's grandmother Gourabai says that she heard the cries raised apparently by Ranaba and came out from inside the house, where she was sleeping, to the sopa and found that the deceased had died and fell upon the person of the deceased; she says further that she saw the accused near him with a scythe in his hand. Ramu said that when he heard the cries he came to the place where the corpse of his son was lying, and he was supported by Dhondiba, who arrived at the scene just after him. Dhondiba said that he arrived at the scene on hearing the cries, and when he went and caught the accused-respondent, he gave him a blow upon the back of his head. Thereupon Chandrabai, his sister, who had come there in the meanwhile, took him away. Now, the respondent admitted at the trial that he had given a blow to Dhondiba; but he said that he did not kill the deceased and suggested that it was probably Dhondiba who had done so. The jury which tried the appellant in respect of the injury on Dhondiba appear, to have believed this story of his, but when giving their opinion on the charge of murder, for which the jurors were only assessors, they said that the guilt of the accused was not proved beyond doubt. The learned Additional Sessions Judge, agreeing with the opinion of the assessors, acquitted the accused.

Now, as the learned Sessions Judge pointed out, the first information report, which was was made by the police patil, does not mention that the accused were identified by Ranaba and Gourabai, the grandmother of the deceased. The report of the police patil has got the column, in which the police patil has to answer a question as to whether the accused were identified, and if so, by whom. The only answer which the police patil gave in this column was that the accused was caught hold of by Dhondiba and the accused's father, upon whom apparently there were also some stains of blood, was caught by the police patil himself and his son. Now, the manner of filling up this report does suggest that the police patil was not very familiar how to fill up the column; but we find that the learned public prosecutor, who appeared for the State, did not inquire from the police patil of the reasons why he had failed to fill up the column properly. The prosecution has necessarily got to explain the absence of the names of the eye witnesses in the report of the police patil, if it is contended that the police patil knew or ought to have known who the eye-witnesses were; and it seems to us that the practice of leaving such questions to be asked in cross-examination, if the defence pleader thinks it fit to do so, must be condemned. It is after all the prosecution which suffers, if the tribunal, that is, the Additional Sessions Judge or the jurors, gets suspicious on account of the fact that the police patil does not mention in his report the names of the eye witnesses, and the prosecution, therefore, ought to have removed any doubt which may arise on that account by examining the police patil on this point. The learned trial Judge was, therefore, right in taking into considera-tion the fact that the first information report does not mention the names of either Ranaba or Gourabai. In the second instance, he pointed out that Gourabai's evidence

would show that her saree got stained with blood, when she fell upon the person of the deceased. She, as a matter of fact, said that her saree was stained with blood, but the sub-Inspector flatly denies this. Gourabai, therefore, obviously did not fall upon the body of the deceased, and even though this need not by itself come into the way of her having come up to the scene to see the accused there, inasmuch as she gave the story which would show that her clothes were stained with blood when they were not, it is impossible to accept that she is telling exactly what happened. If, consequently, Gourabai and Ranaba cannot be believed, then, the only question which remains is as to whether the deceased was killed by Dhondiba or by the accused.

Now, it has got to be remembered that Dhondiba had no reason to kill the deceased; but we are not satis-fied that the accused had any reason to do so either. Ramu at the trial gave a story that he had borrowed Rs.100 from the father of the accused; that he had paid Rs.80 in dribblets; that Rs.20 remained be paid, and that the accused had made a demand sometime before the incident, when Ramu said that he flatly told the accused that he was not in a position to pay the amount then. This story was, however, not given by Ramu in his statement before the police, with the result that the case went up for trial upon the basis that there was no motive apparent for the accused to kill the deceased. Then again it is quite true, as the learned Government Pleader points out, that Dhondiba had got an injury upon his person, and it was the case of Dhondiba as well as the accused that this injury was caused to Dhondiba by the accused. But we are not prepared to accept that that would necessarily show that it was the accused who was the murderer. In the first instance, the injury is upon the back of Dhondiba. According to the doctor, it was on the occipital bone. Now, scythe is an --

instrument which can be used to cause an injury upon the back of a person from the front; but a much more likely explanation is that Dhondiba was injured, when his back was turned towards the accused. It may be, of course, that if with a view to catching hold of the accused Dhondiba threw his arms round the waist of the accused, then, his head would be just in front of the accused, and the accused would be able to cause an injury to Dhondiba on the back of his head. But nobody seems to have thought it fit to ask Dhondiba what was the position in which he was, when the accused caused the injury to him upon his back. It is obvious that if Dhondiba had caught hold of the accused by throwing his hands round his waist, he would have said so. But that question should have been asked to him. The further reason, there-fore, for the learned Additional Sessions Judge to doubt the story was that Dhondibaís injury was upon the back. It is true that Dhondiba had an injury, but if, as the accused says, he found Dhondiba there and snatched the scythe from his hands, it is not probable that Dhondiba might run away, when the accused, not knowing about the law of private defence, might give him an injury on the head with a view to stopping him from running away. He could not, of course, do anything further, when Chandrabai took him away. It seems to us that when the matter looks like that, it is impossible to interfere with the view of the learned Additional Sessions Judge that the guilt of the accused was not proved beyond doubt, a view which was shared by the assessors.

The appeal is, therefore, dismissed. The accused should be set at liberty.

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MJT/-

Judgment recorded by the High Court in Criminal Appeal No.906 of 1953 (By the State) in the case of State Vs. Shivmurti Mudakaya Mathapati.

Mr. A. A. Mandgi, Assistant Government Pleader for the State.
Mr. A.A.Adarkar, Advocate, for the Opponent-accused.

(Coram:- Bavdekar & Vyas JJ)

9th October 1953.

ORAL JUDGMENT :(Per Bavdekar J)

This is an appeal against the acquittal of the - respondent in respect of an offence under Section 471 of the Indian Penal Code. The prosecution story was that the complain -ant Ningawa in this case had along with her husband's two brothers Bhimappa and Lagamappa executed a sale deed of certai property which originally belonged to her husband's father and subsequently she also executed another sale deed in respect of another property of hers alone. When a Debt - Adjustment board was constituted for the area in which the properties conveyed were situated, two applications came to be made to the Debt Adjustment Board. One was by Ningawa and the other was by her husband's brothers. Ningawa's application was rejected and thereupon she filed a suit under the Deccan Agricultural Debtors Relief Act for the redemption of the property conveyed by her alone upon the footing that the - transaction entered into between herself and the vendee was a mortgage. She succeeded in her suit and obtained redemption of the property and as a matter of fact subsequently in execution obtained possession of the property also on the 8th July 1950. It appears that subsequently there was presented in the office of the Sub-Registrar, in whose jurisdiction the redeemed property was situated, a sale deed of the property purporting to have been executed by Ningawa and her daughter on the 20th September 1950. When Ningawa came to know of this sale deed, she complained to the police

105. 13

police that she had not executed the sale deed of the property The case was then investigated and a case was sent up - against the respondent who was the vendee in the sale deed which was handed over to the Sub-Registrar for registration for having used as genuine a forged document. The case was tried before the learned Assistant Judge, Belgaum, who being of the opinion in conjunction with the opinion of the ---- assessors that the deed was a forged one, convicted the respon-dent of an offence under Section 471. In appeal however, the learned Sessions Judge acquitted the respondent following a ruling of the Lahore High Court which has however subsequent-ly been disapproved by this Court. But there was one further reason for which the learned Sessions Judge held that he was not satisfied that the thumb impressions on the sale deed presented for registration were not of Ningawa and Yellawa; that was that the expert who gave his opinion had given it after a comparison of the original and certain photographs, but it had not been shown that the photographs with the aid of which the comparison was made were the photographs of the questioned thumb impressions and the specimen thumb impressions of Yellawa and Ningawa taken during the investigation for the purpose of comparison.

Now , so far as the first ground upon which the learned Sessions Judge relied is concerned, he was obviously wrong.But the next question is as to whether the expert's evidence can be taken into consideration without proof that the photographs which he compared were of the questioned thumb impressions and of the specimen thumb impressions which were taken during the investigation. These photographs were as a matter of fact tendered into evidence and they were marked for the purpose of identification subject to the photographer being examined. The photographer was however subsequently not examined and there was no reason whatsoever given as to why he was not examined. In the result, therefore, prima facie there was no proof of the identity of the photographs and if

15
107

if the thumb impression expert has given his evidence upon comparison with the photographs of which the identity with the originals, i.e. speaking from the photographic point of view, was not proved, then in that case it is obvious that his - evidence ought not to be taken into consideration.

Mr. Mandgi, who appears on behalf of the State, says however that in this case the expert gave his evidence saying that he had given his opinion not only after comparing the pho--tographs, but also after comparing the originals. But that does not show that his opinion was based merely upon a comparison of the originals. He had as a matter of fact compared the photogra--phs also, and if he had actually said that his opinion was the same even if it was made to base upon the originals, a doubt might have arisen as to whether he having taken the help of the photographs before forming his opinion, his subsequent evidence that his opinion would be the same on a comparison with the - originals could be accepted. But the expert did not even say that his opinion, even if he was taking into consideration the originals, would be the same that the thumb impressions upon the sale deed presented for registration were not those of Ningawa and Yellawa.

But it is contended however that in this case the identi--ty of the photographs was proved apart from the evidence of the photographer. Now, I can well understand that, where thumb impressions are concerned, the identity of a photographs as the photograph of a particular thumb impression could be proved with--out examining the photographer by examining the thumb impressio expert who examines the thumb impression itself and the photograph and gives his opinion that the photograph is of the thumb impression. But, in this case, the handwriting expert was not examined to say that the photograph was of a particular thumb impression e.g. the thumb impression supposed to be of Ningawa upon the questioned document. Mr.Mandgi relies, however, in order to show that a particular photograph is of a particular thumb impression, upon certain figures or letters which we find

upon the original thumb impressions or the specimen thumb impress -ions and which, he says, have come in the photographs in the process of photographing. For example, taking up photograph A and thumb impression A, it appears that the letter "A"is also to be found in the photograph and Mr. Mandgi says therefrom that the photograph is of the thumb impression which has been marked A. Similarly, for example, we find in other photographs the figures F.34(6), F34(7), F34,F33 and so on. Now the - identity of a photograph with a particular thumb impression is - sought to be proved by these figures. One does not however know what exactly these figures are which were admittedly put in the thumb impression expert's office. Now, for all I know, F.34(6) may be a type of thumb impression. Nobody says that it was only a number put in order to designate a particular thumb impression. If one were satisfied that the figure e.g. F34(7) which admittedly was put in the office of the thumb impression expert could not be found on any other thumb impress -ion in the office of the finger print expert, then one could say that the identity was established.But there is no such evidence. What happened was that the thumb impression expert gave evidence- saying: "I had taken enlarged photographs of the disputed thumb prints marked A, B and C on Ex. 14. The enlarged photographs have been produced in this case. They too have been marked in my office as A B and C. (These photographs subject to being proved are marked for identification as X, Y and Z respectively). The photographs of the specimen thumb marks on Ex.A , B have also been taken in our office. These enlarged photographs have been produced in this case. The specimen thumb marks of Ningawa are marked F and G in our office and those of Yellawa are marked D and E. (Subject to proof these photographs are marked for identification as L, M ,N and P respectively.)" In another place, he said "these three thumb marks have been marked as A, B and C by the senior expert in our office."

Now, it is admitted that even though the expert said that he had taken enlarged photographs of the disputed thumb prints marked A,B and C on Ex. 14, he had as a matter of fact not taken them. The photographer was a different man. What is

contended on behalf of the State is that so far as the rest of the evidence is concerned, the expert might have been giving evidence from personal knowledge, e.g. he might have been present when the three thumb marks upon Ex. 14 were marked A, B and C by the senior expert in his office. Similarly, he might have been present when the enlarged photographs were marked in his office as A, B and C. Similarly, he might have been present when the photographs of the specimen thumb marks on ex.A, B were taken in his office or when the thumb marks of Ningawa were marked F and G and those of Yellawa were marked D and E. Now, I would be surprised to find that the witness had been present when so many different things were done in his own office by other people, In any case, when the identity of the photographs was not accepted as it is quite clear from what has been mention -ed in the brackets that these photographs are marked for identi- -fication subject to proof, it is impossible to say that these things were spoken to by the witness of his own knowledge.

In any case, this is an attempt made for the first time to prove the identity of the photographs in an appeal from an acquittal before the High Court. It does not appear that any such argument was addressed to the learned Asst. Sessions Judge who decided the case. No such argument obviously was advanced before the learned District Judge when he was inclined to acquit the respondent on appeal. And looking to the doubt which there is in the matter about whether the witness had any personal knowledge about the matter, it would be exceedingly unsafe to interfere with the acquittal holding that the photographs were proved from such dubious evidence.

That being the case, the evidence of the handwriting expert which was given after comparison of the photographs which were not shown to have been photographs of the thumb impressions on the questioned document and the thumb impressions taken for the purpose of comparison during investigation could not be taken into consideration. In any case, no weight could be attach-

attached to it. It is admitted that the rest of the evidence is quite consistent with the thumb impressions upon the questioned document being of Ningawa and Yellawa.

We therefore dismiss the appeal.

PER VYAS J:-

I agree with the conclusion of my learned brother that the appeal must be dismissed.

I would however like to add a few observations. I feel no difficulty in holding that the enlarged photographs marked A,B and C are the photographs of the original thumb impressions marked A, B and C, i.e. the thumb impressions on the document Ex.14. One characteristic which I would call a distinguishing characteristic in case of the original thumb impression marked A is the letters F34(1). The same characteristic is to be found on the photograph also which is marked A. I do not think there is any reason which should make me assume that there might be many thumb impressions in respect of which the feature denoted, say for instance, by the letters F.34(1), may be a common - feature and that, therefore, merely the fact that on the enlarged photograph marked A' there are the letters F34(1) would not be sufficient for showing that the photograph marked A is the photograph of the thumb impression marked A. The science of finger prints has shown that the characteristics of no two finger prints would be identical. I am not therefore inclined to assume that the letters F34(1) might denote a characteristic which might be a common characteristic of thumb impressions more than one. I would hold that the characteristic denoted by the letters F34(1) would be unique or individual only to the thumb impression marked A and, therefore, the presence of this - characteristic on the photograph marked A would show that the photograph marked A is of the thumb impression marked A. The same observations will apply in regard to the photographs marked B and C, and I do not wish therefore to repeat those observa--tions.

However, in regard to the photographs of the specimen

specimen thumb impressions marked D and E of Yellawa and - specimen thumb impressions marked F and G of Ningawa, there is no proof that the photographs concerned are the photographs of the thumb impressions D,E,F and G. In regard to the photographs A, B and C, there is the evidence of the expert who has said: "I had taken enlarged photographs of the disputed thumb prints marked A, B and C on Ex. 14. The enlarged photographs have been produced in this case and they too have been marked in my office as A, B and C." In the case of the so-called - photographs of the specimen thumb impressions D, E,F and G, there is no such evidence given by the expert. For instance, he does not say that the photograph of the thumb impression D was also marked D and so on. Therefore, there would be no proper and legal basis for comparison of the specimen thumb impressions of Ningawa and Yellawa with the alleged thumb impressions of those two women on Ex. 14. Therefore, in the result, I agree with the conclusion of my learned brother that the appeal must be dismissed.

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